IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 01.02.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

S.A.No.346 of 1997

1.Manickam Pillai
2.Kumar .. Appellants/Defendants

vs.

Siva Chidambara Padayachi .. Respondent/Plaintiff

Prayer: This second appeal has been preferred against the Judgment and Decree dated 07.10.1996, in A.S.No.240/1994 passed by the Additional District Judge, Villupram Ramasamy Padayachiyar District, confirming the decree and judgment dated 15.4.1994 in O.S.No.293/1987 on the file of the District Munsif, Thirukoyilur.

For Appellants : Mr.S.Krishnasamy

For Respondent : Mr.V.Raghavachari

JUDGMENT

This second appeal has been preferred against the decree and judgment in A.S.no.240/1994 on the file of the Court of Additional District Judge, Villupuram. The defendants, who have lost their defence before the Courts below, are the appellants herein.

2. The short facts of the case of the plaintiff in the plaint relevant for the purpose of deciding this appeal are as follows:-

The suit is for declaration of the plaintiff's title in respect of the suit property and also for consequential permanent injunction. The plaint schedule property and the property lying south of the suit property belongs to the first defendant and his brothers Kaliyan and Azagappa Pillai. The plaintiff has purchased the suit property on 25.5.1974 from D1 for a consideration of Rs.1,000/-. At the time of Ex.A.1-sale deed D1 and his brothers Kaliyan and Azhagappa Pillai were entitled to 0.41 cents in the plaint survey number property. In the sale deed dated 25.5.1974, four boundaries for 0.41 cents have been given, and undivided 1/3 share in the suit survey number property has been sold under Ex.A.1 in favour of the plaintiff. After the purchase under Ex.A.1 the

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plaintiff has orally partitioned the property along with brothers of D1. Under the said oral partition 27 ½ cents was allotted to D1 on the southern portion of the plaint survey number property. After the sale in favour of the plaintiff, plaintiff was assigned joint patta No.125 for the suit property. During re-survey plaintiff was given patta No.150. The plaintiff is in possession and enjoyment of the suit property continuously for the past 12 years and is paying land tax for the same. Even if there is any defect in the plaint schedule property, the plaintiff has prescribed title to the suit property. The defendants cannot claim any right in respect of the suit property and after the execution of the sale deed they are estoped from doing so. The defendants have denied the right and title of the plaintiff in respect of the suit property on 24.4.1987. Hence the suit.

3. The second defendant has adopted the written statement filed by the first defendant as follows:-

The suit is not maintainable. The averments in the plaint that the plaintiff got right in respect of the suit property under a sale deed dated 25.5.1974 is not true. The averments regarding the four boundaries in respect of 41 cents has been described for his 1/3 share in the suit property is also not correct. The allegation about the oral partition between D1 and his brothers is also not true. The averments in the plaint to the effect that in the oral partition D1 was allotted Southern 0.27 cents is also not true. The plaintiff is not in possession of the suit property as per the alleged sale deed. In reality 0.41 cents comprised in the four boundaries for 1 acres 22 cents in re-survey No.8/2 belonged to one Sundaramurthy Padayachi. He was in possession and enjoyment of the property. The said property was purchased by D1 and his brothers on 5.1.1970, for a consideration of Rs.2,000/-, under a registered sale deed. During February, 1970, the first defendant and his brothers Kaliyan and Azhagappa Pillai have partitioned the property in the presence of village panchayadars and in the said partition, the first defendant got 0.41 cents on the western side in the suit survey number property towards his 1/3 share. Adjacent to the western 1/3 share allotted to the first defendant the adjoining 1/3 share on the East was allotted to Kaliyan and the other 1/3 share was allotted to Azhagappa Pillai just Adjacent to the 1/3 share allotted to Kaliyan on the Eastern side. The above said three brothers were enjoying their respective shares by paying land tax. The first defendant is entitled to 0.41 cents towards his 1/3 share on the western side of the suit survey number property. The first defendant has sold his undivided 1/3 share in the suit property to this plaintiff for a sum of Rs.1,000/- on 25.5.1974. The plaintiff is in possession and enjoyment of the western 1/3 share in the suit property. Only in accordance with the oral partition, the plaintiff's 1/3 share has been described in the sale deed as 13 ¾ cents. The facts stated contrary to the above facts in the plaint are not true. East of

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the suit property, the plaintiff got 27 ½ cents towards his share in the partition. The first defendant has prescribed title to the suit property by way of adverse possession and also by prescription. The plaintiff has not enjoyed the suit property. After 25.5.1974 the plaintiff has not entered into partition with this defendants along with his brothers. The 22 ½ cents on the southern side of the plaint schedule property was not allotted to D1 as alleged in the plaint. In S.No.8/2 measuring 1 acres 22 cents, the first defendant and his brother Kaliyan and Azhagappa Pillai were enjoying the 0.41 cents and out of that D1 had sold 13 ¾ cents. So the plaintiff is entitled to the suit property only on the western portion. This defendant came to know that the plaintiff has obtained patta by furnishing incorrect particulars to the revenue authorities. These defendants have taken steps to cancel the patta before Tahsildar, Ullunthurpet. The first defendant has not given any consent for assigning sub-division numbers to the plaint schedule properties. These defendants are in possession and enjoyment of the suit property. There is no necessity for the defendants to trespass into the plaintiff's property. Hence the suit is liable to be dismissed with costs.

4. The learned trial Judge after going through the pleadings has framed six issues. On the side of the plaintiff, P.W.1 and P.W.2 were examined and Ex.A.1 to A.7 were marked. On the side of the defendants, D.W.1 and D.W.2 were examined and Ex.B.1 to B.3 were marked. After going through the evidence both oral and documentary. The learned Trial Judge has decreed the suit with costs and has dismissed the suit in respect of the relief of mense profits. Aggrieved by the findings of the learned trial Judge, the defendants preferred A.S.No.240/1994 before the Principal District Judge, Villupuram, who has dismissed the appeal, confirming the decree and judgment in O.S.No.293/1987, which necessitated the defendants to file this second appeal.

5. The substantial question of law involved in this second appeal is Whether the Courts below are correct in decreeing the suit on the basis of boundary recitals only in the eastern side when admittedly southern boundary is not as per description under Ex.A.1?

6.The Point:- The suit is for declaration of plaintiff's title and for consequential permanent injunction. The plaint schedule property is 13 ¾ cents in re-survey No.8/2 out of 1 acre 22 cents. The plaintiff claims that he purchased the plaint schedule property under Ex.A.1-sale deed from one Manikkam Pillai and his minor son, who are defendants herein. There was a partition among the brothers of D1-Manikkam Pillai. Under 'F' schedule to Ex.B.2 Manikkam Pillai was allotted 27 ½ cents in S.No.8/2. It is pertinent to note that Ex.B.2 partition has been effected subsequent to Ex.A.1. Under Ex.B.1 the first defendant-Manikkam

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Pillai and his brothers Kaliyan and Azhagappa Pillai have purchased 41 cents out of 1 acres 22 cents in S.No.8/2 in Maruthur Village. After the purchase Manikkam Pillai has sold his undivided 1/3 share in S.No.8/2 i.e. 13 ¾ cents out of 41 cents purchased by three brothers under Ex.B.1. It is pertinent to note that under Ex.A.1 only an undivided 1/3 share was sold to the plaintiff. Under Ex.B.2-partition deed Manikkam Pillai was allotted 27 ½ cents in S.No.8/2. In Ex.B.2-partition deed the plaintiff is not a party. Even though D1 and his two brothers have purchased only 41 cents in S.No.8/2, the total extent mentioned in Ex.A.1 i.e. 13 ¾ cents and the total extent for S.No.8/2 mentioned in Ex.B.2 i.e., 27 ½ cents exceeds by ¼ cents of the total extent of 41 cents purchased by the three brothers under Ex.B.1 (27 ½ + 13 ¾ = 41 ¼). Unless there is a partition between D1 and the plaintiff I am of the considered view that the plaintiff cannot ask for a declaration in respect of the plaint schedule property which is only an undivided 1/3 share in S.No.8/2. Even though the plaintiff has filed revenue records to show that Sub-division has been effected and patta has been given to the plaintiff for survey number 8/2 A, the first defendant is not a party to it. According to the defendants in the written statement, D1 is in possession and enjoyment of the suit property. Unless the suit property is partitioned by meats and bounds I am of the considered opinion that a declaration in respect of the suit property cannot be granted in favour of the plaintiff. Likewise an order of injunction cannot also be granted. The parties shall maintain status quo ante till the property is divided between the first defendant and the plaintiff in equal moities. Even though it is a concurrent finding the above aspect was not considered by the Courts below. Point is answered accordingly.

7. In the result, the appeal is allowed with the following modification in the judgment in A.S.No.240/1994 on the file of the Court of Additional District Judge, Villupuram. The Plaintiff's suit for declaration is dismissed in respect of the suit property. The plaintiff shall file a suit for partition impleading all the sharers to identify his 1/3 share in the suit survey number property in lieu of Ex.A.1-sale deed. Parties are directed to maintain status-quo-ante in respect of the suit property till a

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decision is arrived at in the suit for partition to be filed by the plaintiff. Parties shall bear their own costs.
Ssv

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To,
1.The Addl. District Judge, Villupuram. (with enclosure if any)

2.The District Munsif, Thirukoyilur.
3. The Record Keeper, VR Section, High court, Madras

+ one cc to Mr. V. Raghavachari, Advocate sr no. 6379
+ one cc to Mr. S. Krishnasamy,Advocate sr no. 6150

JE(CO)
NM(28.02.07)

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